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82-343

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROBINSON BUS SERVICE, INC., STEWART BUS COMPANY, INC., RAPID TRANSPORTATION, INC., STUDENT TRANSIT CORPORATION and NORTHTOWN BUS SERVICE, LTD.,

Petitioners,

v.

WILLETT MOTOR COACH CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Date: August 26, 1982

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QUESTION PRESENTED

Does an action brought as a taxpayer's suit violate the due process rights of taxpayers when the interests of the representative plaintiff are directly antagonistic to the interests of the taxpayers it purports to represent?

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In The

Supreme Court of the United States

October Term 1982

ROBINSON BUS SERVICE, INC., STEWART BUS COMPANY, INC., RAPID TRANSPORTATION, INC., STUDENT TRANSIT CORPORATION and NORTHTOWN BUS SERVICE, LTD.,

Petitioners,

v.

WILLETT MOTOR COACH CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioners Robinson Bus Service, Inc., Stewart Bus Company, Inc., Rapid Transportation, Inc., Student Transit Corporation and Northtown Bus Service, Ltd.,* pray that a writ of certiorari issue to review the opinion and judgment of the Appellate Court of Illinois, First Judicial District, Second Division, entered on December 29, 1981.

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* Petitioners' statements pursuant to Supreme Court Rule 28.1 are set forth in the Appendix hereto at page A-17.

In addition to the parties listed in the caption of this Petition, the Board of Education of the City of Chicago, Illinois was the party defendant in the proceedings below.

OPINIONS BELOW

The Order of the Supreme Court of Illinois denying the Petition for Leave to Appeal is set forth commencing at page A-1 of the Appendix hereto. The denial of the Petition for Rehearing to the Illinois Appellate Court is set forth commencing at page A-2 of the Appendix hereto. The opinion of the Illinois Appellate Court is reported at 103 Ill. App. 3d 760, 431 N.E.2d 1190, and is set forth commencing at page A-3 of the Appendix hereto. The unpublished order of the Circuit Court of Cook County, Illinois is set forth at page A-16 of the Appendix hereto.

JURISDICTION

The order of the Supreme Court of Illinois was entered on May 28, 1982, and this petition for certiorari was filed within 90 days of that date.* This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

* No petition for rehearing was filed with the Illinois Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This action arises out of the award of a three-year public contract involving the transportation of handicapped children. In March 1980, the Board of Education of the City of Chicago (the "Board") mailed a "Solicitation of Bids" to prospective bidders and advertised the Solicitation of Bids in a local newspaper. Thereafter, a $36.8 million contract was awarded to a total of twelve different bus companies, including Petitioners herein. Because of modifications in bidding restrictions, small independent bus companies were able for the first time to compete for this public business, thereby resulting in Respondent Willett's loss of a contract it held for the previous 54 years.

In June 1980, Willett filed the instant lawsuit against the Board and other parties seeking to invalidate the contract award. Willett alleged that it had not received one of two amendments to the Bid Solicitation that had been issued by the Board by mail prior to the bid opening. The bid amendment which Willett claimed it had not received changed a unilateral cancellation provision in the contract, which permitted only the Board to cancel the contract, to a mutual cancellation provision, permitting the bus companies themselves to cancel prior

to the expiration of the contract. Petitioners herein, Robinson Bus Service, Inc., Stewart Bus Company, Inc., Rapid Transportation, Inc., Student Transit Corporation, and Northtown Bus Service, Ltd., were successful bidders on this Board of Education contract. Petitioners were permitted to intervene as defendants in the proceedings below.

The trial court dismissed Willett's original complaint to vitiate the award on the basis that it lacked standing as a losing bidder to bring such an action. Thereafter, however, the trial court permitted the suit to proceed as a taxpayer's suit over the objections of Petitioners herein.* At the conclusion of a trial, the court, sitting without a jury, found that Willett had not proved that it had not received the subject bid amendment and denied Willett's request for declaratory and injunctive relief. (A-16).

Willett appealed to the Illinois Appellate Court from the decision in favor of the defendant Board of Education. The Appellate Court reversed the judgment of the trial court and granted Willett's prayer for relief, which included the entry of a mandatory injunction nullifying the bid award and ordering the contract re-bid.** The Appellate Court not only reversed the trial court's finding on the issue of proof of mailing the subject bid amendment, but also held that the requirements of a taxpayer's suit were satisfied. The court made this ruling on the basis of the testimony of a Willett officer

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* Petitioners herein, also taxpayers, have challenged and objected to Willett's prosecution of this case as a taxpayer's suit throughout the proceedings below.

** Two of the three years of the subject contract having already elapsed, the disruptive effect of the Appellate Court's ruling on Petitioner's business, the public, as well as on the handicapped school children is clear.

that had it received notice of the subject amendment, the amount of its bid would "probably" have been lower than that submitted by the other bidders. However, in reversing the trial judge, the Appellate Court acknowledged that in the instant case it was most questionable that the public, considering the impact of "inflation", would be benefitted by its Order requiring a re-bid of the subject contract. (A-15).

A petition for rehearing was filed in the Illinois Appellate Court on January 19, 1982 and was denied on February 23, 1982. (A-2). Thereafter, the Board of Education and intervenor-defendants filed a Petition for Leave to Appeal to the Illinois Supreme Court, which was denied on May 28, 1982.* (A-1). Although no petition for rehearing was filed, the Illinois Supreme Court granted a Stay of the Mandate pending disposition of this Petition. At the same time, the Illinois Supreme Court also denied Willett's request for immediate issuance of the mandate.

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* The Attorney General of the State of Illinois filed a brief as *amicus curiae* in support of the Petition for Leave to Appeal of the Board of Education and petitioners herein. The Attorney General's brief framed the issue as follows:

> "The crucial question presented by the instant case is whether a disappointed bidder on a governmental contract has standing as a taxpayer to sue to invalidate such contract where the result of such a suit will almost certainly lead to an increased expenditure of tax dollars." Brief of Attorney General at 1.

The Attorney General concluded:

> "[I]n the instant case while it was in plaintiff's interest as a disappointed bidder on the contract to sue to invalidate the contract so that it would have the opportunity to submit another bid, such interest did not coincide with the interest of the taxpayers in spending as little as possible to obtain necessary governmental services." *Id.* at 3.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT HERETOFORE BEEN DECIDED BY THIS COURT.

The decision of the Illinois Appellate Court involves a constitutional issue which has never been decided by this Court. Specifically, the opinion of the Appellate Court sanctions the adjudication of taxpayer suits despite the fact that the standing of the representative plaintiff-taxpayer is diametrically opposed to the interests of the Illinois taxpayers it purports to represent. The issue is one of great importance because it involves basic principles of due process embodied in the Fourteenth Amendment to the United States Constitution.

A plaintiff claiming taxpayer standing must be a proper party to request adjudication of a particular issue, *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968), because, as Justice Harlan pointed out, "[t]he relief available to such a plaintiff consists entirely of the vindication of rights held in common by all citizens." 392 U.S. at 118 (Harlan, J., dissenting). Like many other representative actions, taxpayer suits are "'public actions' brought to vindicate public rights." *Id.* at 120. *Compare, Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 266 (1972) (discussing both *parens patriae* and class actions as appropriate procedures to vindicate public rights under the antitrust laws). The decision of the lower court granting Willett taxpayer standing on the basis of "savings to the . . . general taxpayers" (A-14) is "based on the theory that a taxpayer is a private attorney general seeking to vindicate the public interest." 392 U.S. at 108 (Douglas, J., concurring). *Compare, United States*

Parole Commission v. Geraghty, 445 U.S. 388, 403 (1980) (the "right" to class certification "is . . . analogous to the private attorney general concept"). However, when the remedy sought by a representative taxpayer is antagonistic to the interests of all other taxpayers, the public interest is not and cannot be vindicated. To the contrary, the due process rights of the general taxpayers who likely face an increased tax burden if the representative taxpayer prevails are denied.

In a representative action, due process requires, at the very least, that the interests of the representative party may not be directly antagonistic to the interests of the absentees which the representative purports to champion. *Hansberry v. Lee*, 311 U.S. 32 (1940); *see also, Sam Fox v. United States*, 366 U.S. 683, 691 (1961). A representative plaintiff cannot maintain his action, and will not be allowed to pursue his action on behalf of absentee third parties, when his interests are "antagonistic in fact to, *or even 'potentially conflicting' with*," the interests of the persons he purports to represent. *Phillips v. Klassen*, 502 F.2d 362, 366 (D.C. Cir. 1974) (emphasis added); *see also, Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979); *Nat. Ass'n of Regional Medical Programs v. Mathews*, 551 F.2d 340, 345 (5th Cir. 1976), *cert. den.*, 431 U.S. 954 (1977); *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977); *Sperry Rand Corp. v. Larson*, 554 F.2d 868 (8th Cir. 1977).

At present, there is no decision of this Court which has addressed the question of a taxpayer-plaintiff's standing to serve as a representative plaintiff where his interests are antagonistic to those of all other taxpayers he seeks to represent. However, in other representative actions, such as class actions, this Court has consistently held that due process requires that a determination be made as to whether the representative party adequately

represents the interests of the class. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302 (1853). In such determinations, courts must focus on the relief sought by the representative and whether such relief would or would not be repugnant to absent class members. Indeed, in the context of class actions there are frequently occasions when absent class members would prefer to see no action brought at all if the relief sought by the representative were ultimately granted. *See, e.g., Ihrke v. Northern States Power Company*, 459 F.2d 566, 572 (8th Cir. 1972). Had this case been brought as a class action rather than as a taxpayer's action, it would be inconceivable that a class of Illinois taxpayers would agree with a losing bidder's desire to reopen bidding on a public contract which was awarded more than two years previously, particularly in view of the fact that it would likely cost taxpayers more money.

In this case, Willett had initially filed its suit in state court as an unsuccessful bidder to nullify the award of a public contract.* After dismissal of its action for lack of standing, Willett refiled its complaint alleging that it was bringing the action on its own behalf and on behalf of all other Illinois taxpayers. During the course of the trial below, Willett did not and could not prove that the relief it was seeking—a re-bid of the challenged con-

* The absence of a right for unsuccessful bidders to challenge a competitively bid contract award is consistent with both federal and state court decisions. *See, e.g., Cubic Western Data v. New Jersey Turnpike Authority*, 468 F.Supp. 59, 70 (D.N.J. 1978); *Beaver Glass & Mirror v. Bd. of Ed., Rockford Sch. Dist.*, 59 Ill.App.3d 880, 376 N.E.2d 377, 381 (2d Dist. 1978). Thus, unlike a class representative who can pursue an action on his own behalf if denied class certification, a disappointed bidder has no standing to challenge an award except in the guise of a taxpayer.

tract, years after the contract was awarded and in operation—would result in any monetary savings to the taxpayers. At best, even if Willett were able to obtain the relief it sought at the very instant it filed its complaint, its claim of taxpayers' savings at that time would be wholly speculative and inconsistent with the minimal "good faith pocketbook" requirement articulated in *Doremus v. Board of Education*, 342 U.S. 429 (1952).

The opinion of the Illinois Appellate Court recognized that because Willett had "assumed the posture of a taxpayer" it was "obligated to prove that the action of the Board resulted in a true loss to the general taxpayer." (A-13). The court calculated what it felt could have been the extent of taxpayers' "savings" had Willett received the disputed Amendment to the Solicitation of Bids at the time of the original bid. However, the court pointedly refused to consider whether the *relief* sought in Willett's taxpayer action was actually in the interest of the taxpaying public, stating that it would "not indulge in speculation as to whether rebidding of these contracts will meet or exceed, by virtue of inflation, the amounts previously bid in April of 1980." (A-15). With this statement, the Appellate Court tacitly acknowledges that Willett could not demonstrate that the relief it sought would not, in fact, cost Illinois taxpayers more money. Thus, if the decision of the Illinois Appellate Court is allowed to stand and the subject contract rebid at this late juncture, only Willett, if successful in its re-bid, would profit. Illinois taxpayers, however, who, in these inflationary times, will invariably have to pay the cost of a more expensive contract than that awarded in April 1980, would suffer a pecuniary loss.*

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* The only evidence offered in support of Willett's allegation of taxpayer benefits was the self-serving testimony of an of-

(Footnote continued on following page)

More importantly, if the lower court's decision is allowed to stand, representative actions brought under the guise of "taxpayer suits" can be used to advance interests of the representative alone, to the detriment of the public at large. A decision by this Court limiting taxpayer standing when the due process rights of taxpayers at large are denied, would prevent egregious cases such as the case at bar. By the lower court's reasoning, the interests of a representative litigant as a taxpayer (and, *a priori*, the interests of all the taxpayers the litigant purports to represent) are subordinated to the litigant's personal interest.* This clear conflict of interest, sanctioned by the decision of the lower court, amounts to a taking of the property of Illinois taxpayers without due process of law.

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footnote continued

ficer of Willett, that Willett's bid in April 1980 would have "probably" been lower than the bid it actually submitted had it received the subject amendment to the bid specifications. This evidence, however, does not take into account the added costs to the taxpayers if the subject contract is re-bid in 1982. Not only did the Appellate Court fail to consider "costs" of inflation, but also failed to consider the additional costs of reopening public bidding and the disruption of necessary public services.

* Among the cases which have expressed concern at the adequacy of taxpayers' representation when the plaintiff qua taxpayer is also a disappointed bidder are *Pullman Incorporated v. Volpe*, 337 F.Supp. 432, 442 n.4 (E.D.Pa. 1971); *Szmodis v. Romney*, 307 F.Supp. 607, 610 (E.D.Pa. 1969); *Contel Construction Corporation v. Parker*, 261 F.Supp. 428, 431 (E.D.Pa. 1966).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: August 26, 1982

APPENDIX

ILLINOIS SUPREME COURT
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H. Wayne Russell
Clerk
May 28, 1982

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No. 56435—Willett Motor Coach Co., respondent, vs. Board of Education of the City of Chicago, a body politic and corporate, et al. (Robinson Bus Service, Inc., et al., petitioners). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ H. WAYNE RUSSELL
Clerk of the Supreme Court

No. 81-1134

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WILLETT MOTOR COACH CO.,

Plaintiff-Appellant,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate,

Defendant-Appellee,

and

ROBINSON BUS SERVICE, INC., STEWART BUS COMPANY, INC., RAPID TRANSPORTATION, INC., STUDENT TRANSIT CORPORATION and NORTHTOWN BUS SERVICE, LTD.,

Intervenor-Defendants-Appellees.

ORDER

Intervenor-Defendants-Appellees' Petition for Rehearing is hereby denied.

/s/ ROBERT J. DOWNING, Justice
/s/ MAURICE PERLIN, Justice
/s/ ALLEN HARTMAN, Justice

Dated: February 23, 1982
ORDER ENTERED FEB. 23, 1982

No. 81-1134

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
(2nd DIVISION)

WILLETT MOTOR COACH CO., Plaintiff-Appellant, v. BOARD OF EDUCATION OF THE CITY OF CHICAGO et al., Defendants-Appellees.

Opinion filed December 29, 1981.—Rehearing denied February 23, 1982.

PRESIDING JUSTICE HARTMAN delivered the opinion of the court:

Plaintiff Willett Motor Coach Co. (Willett), as a taxpayer, brought an action for injunctive and declaratory relief against the Board of Education of the City of Chicago (Board) and certain bus companies (defendants), which sought: (1) revocation of three-year contracts awarded for transportation of handicapped children attending Chicago public schools, ending August 31, 1983; (2) a requirement that the Board rebid those contracts; and (3) a declaratory judgment holding illegal the bidding procedure on which the subject contracts were predicated, and that all bids received pursuant thereto are null and void. Willett claimed that the Board failed to mail and that it did not receive a "Notice to Bidders" containing an amendment to the Board's original solicitation for bids. After a bench trial, judgment was entered for the Board and defendants. Willett appeals.

The issue raised for our consideration is whether the trial court's finding that the Board mailed the amendment to Willett was against the manifest weight of the evidence. A corollary issue is whether Willett proved a resultant true loss to general taxpayers as a result of the judgment.

From the evidence it appears that for the past 54 years Willett has provided busing services for the Board, transporting handicapped pupils attending Chicago public schools. On March 12, 1980, the Board solicited bids for contracts to provide 403 vehicles for such transportation. Willett received the solicitation by mail on March 13, 1980. The solicitation required submission of bids no later than 2 p.m. on April 15, 1980, and provided, "this agreement will be subject to cancellation by the Board of Education of the City of Chicago in sixty (60) days' written notice." The solicitation was subsequently amended by two separate notices to bidders, the second of which, not a subject of controversy in this action, was received by Willett. The first amendment ("amendment"), dated March 21, 1980, which Willett claims it did not receive, changed the Board's unilateral cancellation provision contained in the original solicitation to allow that either the Board or any contractor could cancel all obligations on 60 calendar days' notice.

In its second amended complaint Willett alleged that: no notice of said amendment was mailed or communicated to Willett; without the amendment, a successful bidder would be required to perform its obligations for three years; on April 15, 1980, Willett submitted its proposal to the Board without having any knowledge or notice of its amendment; Willett's estimates of possible labor increases and the cost of performance bonds would have been lower had it known of the amendment; consequently, its lack of knowledge placed Willett at an economic disadvantage; and, had Willett received or been aware of the amendment, it would have submitted a proposal to the Board in an amount less than the total amounts bid by the successful bidders.

At trial, Willett presented five witnesses and obtained a stipulation with respect to a sixth witness relative to the asserted lack of receipt of the bilateral cancellation amendment. William J. Merges, assistant director of purchases for the Board, was called by Willett pursuant to section 60 of the Civil Practice Act (Ill. Rev. Stat. 1979, ch. 110, par. 60). He testified that in 1980 he was

responsible for the preparation of bids. To secure the greatest number of qualified bids, they were mailed to all firms on a bidders' list for bus transportation and advertisements were placed in the newspaper. In his opinion, the amendment might have had the effect of causing more bidders to bid on this contract; however, other regulation changes by the Board may have also had this effect. He did not personally inform Willett of the amendment. Prospective bidders were required to attach the solicitation for bids and amendments to bids to their proposals; however, the notice of the amendment at issue was not attached to Willett's proposal. Bidders could submit either an "all-or-nothing" bid on all 403 buses, or could bid on a lesser quantity on a price per bus per day basis; thus the Board could compare one "all-or-nothing" bid, such as Willett submitted, to an accumulation of smaller bids. The total cost to the Board for the contracts awarded was $36,835,270.56. Merges did not personally mail notices of amendments.

Sharon Tlanda, a secretary employed by Willett, Inc., testified that she was responsible for sorting mail for all of the Willett companies, including Willett, Inc., and Willett Motor Coach Co.[1] during the period in question. Plaintiff's offices were one block away from her own. All mail for plaintiff was placed in a separate box. Mail from the Board was placed in the same box, and ultimately such mail went to William Hood, one of plaintiff's officers. The receptionist, Kathy Pecoraro, also sorted mail. After the morning mail was sorted, someone from Willett, either Hood, Ray Skawski or Greg Bonnett, would pick up Willett's mail. The same routine was followed after the afternoon mail delivery.

It was stipulated that testimony of Kathy Pecoraro would be the same as Tlanda's except with regard to the afternoon mail.

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[1] Plaintiff Willett Motor Coach Co. is a wholly owned subsidiary of Willett, Inc., which is also the parent corporation of Spears Transportation, Inc.

Linda Keating, assistant secretary to the chairman of the board at Willett, Inc., testified that if any mail came from the Board she would inform Hood, and would either hold it until he picked it up or would take it to Willett's mailbox. She forwarded all mail from the Board except checks.

Gregory Bonnett and Raymond J. Skawski, employees of plaintiff, both testified that on occasion they picked up the morning and afternoon mail for plaintiff from Willett, Inc. Unless mail was directed to a specific individual, they brought it to Hood, who also received all mail from the Board.

Andrew Langert, assistant treasurer for Willett, Inc., and vice president of finance for plaintiff, testified that his duties included the preparation of bid proposals submitted to the Board. When he worked on the subject proposal he was not aware of the amendment to the bid solicitation. Plaintiff had submitted two other bids, for two other contracts, to the Board, both of which contained bilateral cancellation provisions. Knowledge of the amendment would have been important in preparing the proposal because if Willett did not have the option to cancel a contract it would have less leverage in negotiating with its drivers' labor union, which would in turn affect the cost estimate used in compiling the proposal.

William Hood, vice president of Spears Transportation, formerly vice president of plaintiff, testified that he was responsible for preparation of the subject proposal. He reiterated the routine for retrieving mail contained in previous testimony. Mail from the Board was addressed either to Willett, Inc., or plaintiff. Although he did receive the second amendment, which is not an issue in this lawsuit, he had no knowledge of the subject amendment until April 17, 1980, after bids were submitted, when Merges met with him and Langert and so informed them. The basic bid submitted by plaintiff was $225.84 per day per bus for a Type 1 bus. The "low price" on an alternative bid submitted was $196.74, which applied to a contract providing for older vehicles than those specified by the Board or where municipal

bonds were to be used instead of performance bonds. Both were "all-or-nothing" bids. Had Hood had knowledge of the amendment, a bid would have been submitted from $163 to $168 per bus per day.

According to Hood, a subsequent bid submitted in July 1980, containing a mutual cancellation clause, on a contract involving over 300 buses, was $179.27 per day per bus, as the basic bid; an alternative bid of $164.47 per day per bus, for vehicles older than specified; and a second alternative bid of $177.05, in which municipal bonds were proposed instead of performance bonds. Another bid, predicated on a mutual cancellation provision regarding a contract for two buses for students attending O'Hare Airport, was for $225.84. A third bid involving 45 buses for children attending Walt Disney School, again based on a mutual cancellation clause provision, was for $225.84. Hood explained that the fewer buses contemplated in a bid, the higher the bid would be, since expenses would be divided among fewer vehicles.

David W. Howell, chairman of Willett, Inc., stated he had no knowledge of the amendment when bids were submitted and reiterated the ramifications thereof as explained by Hood.

James Watts, data coder for the Board, testified for the Board and defendants. During the time in question he was responsible for running the bids and labels for the Bureau of Purchases from vendor cards listing vendors for bus transportation. The vendor cards were placed in a machine which automatically printed labels therefrom. Cards could not be removed without a specific directive; he never pulled a card on his own initiative. He always counted the labels to make sure they corresponded to the number of vendor cards. The labeling process would also be used for amendments to Board solicitations of bids. After labels were produced, they were counted to ascertain whether they corresponded to the number of vendors on the list. If so, labels were taken by Watts to personnel to be pasted on envelopes, after which the envelopes were counted and compared to the number of vendor cards, and taken to the mailroom.

There, the envelopes are put through a meter stamp machine. He had no specific recollection of having taken any of the steps in the process described above with respect to the amendment at issue, nor could he recall having actually mailed the envelopes. No other witness as to the mailing of the amendment at issue was produced.

The trial court found that too many people at plaintiff or Willett, Inc., handled mail addressed to Willett, so that plaintiff had not proved it had not received the notice of amendment, and denied plaintiff the relief it sought.

Willett argues that the trial court's finding that the amendment was mailed to Willett was against the manifest weight of the evidence. It first maintains that the Board was obliged to mail the amendment to Willett, relying upon sections 34-21.3 and 10-20.21 of the School Code (Ill. Rev. Stat. 1979, ch. 122, pars. 34-21.3 and 10-20.21) and chapter V, section 5-4 of the Rules of the Board, as amended September 28, 1979. The latter section provides, in part:

> "Solicitations of formal bids shall be advertised in a newspaper of general circulation published in the City of Chicago at least 10 days before the bid date, and by such other means that will secure the greatest number of qualified proposals * * *."

Willett asserts that the mailing of the notice of amendment constituted the "other means" specified, and that compliance with rules regarding competitive bidding, such as section 5-4, is a prerequisite to the formation of a valid contract between the Board and a successful bidder. As authority for this latter principle Willett cites *Premier Electrical Construction Co. v. Board of Education* (1979), 70 Ill. App. 3d 866, 871, 388 N.E.2d 1088. In that case a bidder who had not complied with certain statutory requirements for bidding attempted unsuccessfully to assert a contract between the Board and itself. Willett urges that here the evidence failed to demonstrate that the amendment was mailed to it; the Board, therefore, did not comply with its own rule,

thereby denying to Willett an opportunity to submit a competitive proposal.

Willett insists that no evidence was presented by the Board that the amendment was mailed or even sent to the bid solicitation section for mailing; rather, evidence was presented only as to customary mailing procedures. It cites cases for the principle that although the mailing of a properly stamped and addressed letter raises the presumption the letter was received by the addressee, denial of receipt rebuts the presumption and receipt then becomes a question to be resolved by the trier of fact. Moreover, proof of customary practices regarding mailing procedures is insufficient to establish the mailing of a specific item and thereby raise the presumption. Among those cases are *Meyer v. Krug* (1939), 298 Ill. App. 625, 19 N.E.2d 111; *State Bank v. Standaert* (1948), 335 Ill. App. 519, 82 N.E.2d 393; *M. S. Kaplan Co. v. Cullerton* (1977), 49 Ill. App. 3d 374, 364 N.E.2d 381; and *Lynn v. Village of West City* (1976), 36 Ill. App. 3d 561, 345 N.E.2d 172.

The Board and other defendants seek to distinguish the foregoing authorities on several grounds. First, they argue that in those cases the proof of mailing was a statutory or contractual condition precedent to a party's right of recovery or relief, in other words, that it was plaintiff's burden in each case to prove mailing; and that mailing was a condition precedent to recovery. Here, they assert, the action was not brought by the party whose responsibility it was to prove mailing. We disagree. In *M. S. Kaplan Co. v. Cullerton*, an attempt was made to prove mailing of notice of a hearing regarding increased valuation of plaintiff's property through evidence of records indicating the notice was prepared for mailing. Plaintiff sought to enjoin defendant from collecting taxes, claiming he had not received notice of a hearing. Plaintiff there, as here, alleged lack of receipt of notice, and the tax based upon the increased assessment was held void in the absence of evidence from the assessor that the notice of hearing was actually and timely mailed to plaintiff.

The Board and other defendants also claim that in the cases above-cited, as opposed to the case at bar, there was a statutory or contractual duty to mail the item in question and maintain that there is no such requirement here that the amendment be mailed. They hereby suggest either that the provisions of chapter V, section 5-4 do not necessitate a mailing, or that they do not apply to a notice of amendment. Merges, the Board's assistant director of purchases, testified, however, that the language of section 5-4, "* * * such other means that will serve the greatest number of qualified proposals," meant mailing to all the firms on the regular bidders' list. He also stated that the same Board unit, the bid solicitation department, had the responsibility of mailing both the original bids and the notices of amendment. To hold that the Board was required to mail the original bids to all potential bidders, but that it was unnecessary to advise those bidders of substantive amendments to the requirements would be a mockery of the bidding process which "* * * necessarily implies equal opportunity to and freedom in all whose interests or inclinations might thus impel them to compete at the bidding." *Dement v. Rokker* (1888), 126 Ill. 174, 196, 19 N.E. 33.

The Board and other defendants would distinguish the cited cases from the instant case in that none of those cited involved a mass mailing; therefore, they seek a more lenient standard of proof here. Although none of the cases cited expressly refer to a mass mailing, it is clear that some involved mailings which were not unique in character and at least one, in all probability, occurred on a large scale, *e.g.*, *M. S. Kaplan Co. v. Cullerton*, which was concerned with tax collection procedures indubitably followed on a county-wide basis.

Appellees contend that, although the cases cited hold that mere proof of custom and practice regarding mailing is insufficient proof of the fact that a particular item was mailed, in the instant case there was more evidence of mailing adduced than that of business procedures. They suggest that because there is evidence that Willett received both the first solicitation of bids and the second

amendment, the presumption is raised that Willett received the first amendment, citing a breach of contract case, *Tabor & Co. v. Gorenz* (1976), 43 Ill. App. 3d 124, 130, 356 N.E.2d 1150, in which defendants there denied receipt of a confirmation of an oral agreement sent by plaintiff. In *Tabor*, however, corroborating evidence, in addition to proof of office custom as to preparation, addressing, stamping and mailing of contract confirmations, was adduced, including: copies of the confirmation of contract forms sent to defendant; receipt by defendant of other mailings close in time to the transaction in question; defendant's failure to complain about previous deliveries which were made in accordance with the disputed oral contract; and failure of defendant to keep accurate records of its business transactions. In contrast here, no evidence was presented by the Board that its mailing procedures were actually followed in the instance of the first amendment to bidding procedures under consideration. There was nothing to show that the amendment was mailed to any bidder on the list, whether to Willett or some other entity. The fact that several such notices of amendment were attached to submitted bids does not lead to the inference that they were received by mail; these bidders were also defendants in this case who could have easily supplied evidence at trial that they had received the notices of amendment by mail, and thereby filled this hiatus in proof that existed in the Board's case. Under this state of the record, *Tabor* offers little support to defendants' position.

Appellees further assert that evidence adduced by Willett failed to establish that it did not receive the notice of amendment, since several individuals handled the mail and delivered it from Willett, Inc., to plaintiff Willett Motor Coach Co.; mail from the Board was sometimes addressed to Willett, Inc., and sometimes to Willett Motor Coach; and there is no certainty that mail sent by the Board was not mishandled or lost by plaintiff's employees. They also point out that the labels in evidence bear the name Willett, Inc., instead of plaintiff Willett Motor Coach Co. Evidence that neither corporation received the first amendment to bidding pro-

cedures was presented by plaintiff, however, including testimony by officers of both corporations, two mail sorters and three mail delivery people, which has already been described earlier in this opinion and need not be repeated here. That evidence related to every person in either corporation that would have had any contact with such mail.

A chancellor's decree, based upon testimony given before him during trial, will not be reversed unless palpably contrary to the manifest weight of the evidence; however where upon examination of the entire record, it appears that the decree cannot be justified by the record, it must be reversed. (*Stephenson v. Kulichek* (1951), 410 Ill. 139, 147, 101 N.E.2d 542; *Goldblatt Bros., Inc. v. Addison Green Meadows, Inc.* (1972), 8 Ill. App. 3d 490, 499, 290 N.E.2d 715; *Liddell v. Smith* (1965), 65 Ill. App. 2d 352, 357, 213 N.E.2d 604.) In the case before us, when Willett's evidence of lack of receipt is considered in contraposition to defendant's lack of evidence showing that the amendment to bid was actually mailed to anyone, we are forced to conclude that the chancellor's conclusion was palpably contrary to the manifest weight of the evidence and must be reversed.

Appellees rely on cases which hold that in awarding a contract to the "lowest responsible bidder" for competitively bid contracts, public bodies have broad discretion with which courts will not interfere in the absence of fraud, and there is a presumption that the action of authorities in awarding contracts is regular and lawful. (*Kelly v. City of Chicago* (1871), 62 Ill. 279; *People v. Kent* (1896), 160 Ill. 655, 43 N.E. 760; *Johnson v. Sanitary District* (1896), 163 Ill. 285, 45 N.E. 213; *Hallett v. City of Elgin* (1912), 254 Ill. 343, 98 N.E. 530; *People ex rel. Peterson v. Omen* (1919), 290 Ill. 59, 124 N.E. 860.) In none of those cases, however, was it claimed by an unsuccessful bidder, as in the instant case, that a substantive amendment to bidding requirements which could have affected the bid amount, was not sent to, or received by, an interested bidder in the same manner as the solicitation for bid was sent. Appellees claim further that actions of public officials are

presumed honest and regular, citing cases in which the honesty of public officials was in issue. (*Smith v. Board of Education* (1950), 405 Ill. 143, 89 N.E.2d 893; *Tribune Co. v. Thompson* (1930), 342 Ill. 503, 174 N.E. 561; *Panozzo v. City of Rockford* (1940), 306 Ill. App. 443, 28 N.E.2d 748.) Those cases weigh allegations of conspiracy and fraud charged against public officials, and motivation underlying their official acts. Here, Willett makes no charge of dishonesty; the thrust of this appeal is whether there was sufficient proof offered by the Board to link its regular solicitation for bid mailing procedures to the dissemination of the amendment to bid.

Appellees further argue that Willett has not demonstrated that if it had known about the amendment, it would have bid lower than other bidders. At the outset of our consideration of this contention, it may be observed that no finding was made by the chancellor in this aspect of the case; he did, however, deny appellees' motion for judgment at the close of Willett's proof on this point. No countervailing evidence was offered by appellees in this regard. We also note that evidence of what one "would have done" under circumstances other than those which actually obtained, necessarily partakes of some measure of speculation. Nevertheless, Willett assumed the posture of a taxpayer and, therefore, was obligated to prove that the action of the Board resulted in a true loss to the general taxpayer, which requires some measure of this type of evidence. *Barrett v. City of Chicago* (1956), 11 Ill. App. 2d 146, 154, 136 N.E.2d 564; *People ex rel. Hamer v. Board of Education* (1974), 22 Ill. App. 3d 130, 135, 316 N.E.2d 820; *Lynch v. Devine* (1977), 45 Ill. App. 3d 743, 749-50, 359 N.E.2d 1137.

The Board's solicitation permitted bids to be submitted for all or any part of the required 403 buses. Willett was the only single bidder for all the buses. The award was made to 12 different bus companies. Their bids ranged from $134 per bus per day to $255.84 per bus per day. Hood, an officer who was, in part, responsible for the preparation of Willett's bid submission, testified that had Willett known of the bid solicitation amendment providing for a 60-day bilateral cancellation

clause, it would have bid from $163 to $168 per day per bus. Hood explained the basis for that statement. Willett was experiencing the highest labor costs in the city for its type of operation, necessarily a factor in the bid price. In order to remain competitive and in business, those costs had to be lowered; this, in turn, would lower the bid price. At the time of the bidding, Willett was in the midst of labor negotiations with its drivers' union, and the 60-day cancellation clause would have provided Willett with necessary leverage in those discussions. Howell, chairman of Willett, Inc., the parent corporation, testified that he had assisted in the preparation of Willett's bid. He explained that in the absence of the 60-day bilateral cancellation clause, Willett had no leverage with which to bargain with its union. The possibility of a strike under those circumstances would have increased the cost of a performance bond. With the cancellation clause, Willett could risk submitting a low bid and use the lower figure to negotiate a satisfactory wage agreement. Another factor that would have been considered was that the bilateral cancellation clause encouraged bids from many bidders who were unable to obtain performance bonds for a 3-year contract, which would have constituted an added incentive for submitting a lower bid. The 60-day cancellation clause required a bond that guaranteed no more than 60 days performance. Had Willett known this, it would have also known that it would have to bid lower to get the contract.

The savings to the Board and general taxpayers if Willett's bid had been at the $163 to $168 per day per bus figure would have been substantial. Taking the higher figure of $168 per bus and multiplying by 403 buses, and then that product, $67,704, by the 528 days of contract duration, the final product is $35,747,712, or $1,087,558 less than the total cost to the Board of $36,835,270 by virtue of its acceptance of defendant's bids. Such a savings would have been sufficient to satisfy the necessary showing in a taxpayer suit such as this that a true loss to the general taxpayer had been in-

curred by virtue of the Board's procedures, or lack thereof, here.[2]

From our consideration of the entire record, we are compelled to reverse the judgment denying Willett's prayer for injunctive and declaratory relief, and remand to the circuit court of Cook County for entry of orders prayed for in Willett's second amended complaint.

Reversed and remanded.

DOWNING and PERLIN, JJ., concur.

[2] We may not indulge in speculation as to whether rebidding of these contracts will meet or exceed, by virtue of inflation, the amounts previously bid in April of 1980.

No. 80 CH 4044

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT
CHANCERY DIVISION

WILLETT MOTOR COACH CO.,

Plaintiff,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

ORDER

This cause coming pursuant to previous order of court for trial, all parties being present through their counsel, evidence having been taken and arguments having been heard and the court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. The court finds for the defendants and against the plaintiff.

2. Plaintiff's prayer for a permanent injunction against defendants performing certain bus transportation contracts is hereby denied.

3. Plaintiffs prayer for declaratory relief that said contracts were illegally entered into is hereby denied.

4. No just cause exists to delay enforcement or appeal of this order.

May 1, 1981

ENTER: /s/ ALBERT GREEN
Judge

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Petitioner ROBINSON BUS SERVICE, INC., has no parent companies, subsidiaries cther than wholly-owned subsidiaries, or affiliates.

Petitioner STEWART BUS COMPANY, INC., has no parent companies, subsidiaries other than wholly-owned subsidiaries, or affiliates.

Petitioner RAPID TRANSPORTATION, INC., has no parent companies, subsidiaries other than wholly-owned subsidiaries, or affiliates.

Petitioner NORTHTOWN BUS SERVICE, LTD., has no parent companies, subsidiaries other than wholly-owned subsidiaries, or affiliates.

Office - Supreme Court, U.S.
FILED
SEP 23 1982
ALEXANDER L. S... JR.
CLERK

No. 82-343

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROBINSON BUS SERVICE, INC., STEWART BUS COMPANY, INC., RAPID TRANSPORTATION, INC., STUDENT TRANSIT CORPORATION and NORTHTOWN BUS SERVICE, LTD.,

Petitioners,

v.

WILLETT MOTOR COACH CO.,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

October Term 1982

ROBINSON BUS SERVICE, INC., STEWART BUS COMPANY, INC., RAPID TRANSPORTATION, INC., STUDENT TRANSIT CORPORATION and NORTHTOWN BUS SERVICE, LTD.,

Petitioners,

v.

WILLETT MOTOR COACH CO.,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied. No federal questions were raised in or ruled upon by the Circuit Court of Cook County, Chancery Division, the Appellate Court of Illinois, First District, Second Division or the Illinois Supreme Court. This petition was filed solely for the purpose of causing the Illinois Supreme Court to delay the issuance of its mandate, thereby mooting the relief ordered by the Appellate Court of Illinois.

ARGUMENT

PETITIONERS FAILED TO RAISE OR PRESERVE ANY FEDERAL QUESTION IN THE COURTS OF THE STATE OF ILLINOIS THEREBY FAILING TO COMPLY WITH THE JURISDICTIONAL REQUIREMENTS AND RULES OF THIS COURT.

The petition for a writ of certiorari in this case is a blatant abuse of this Court's proceedings. Respondent, Willett Motor Coach Co., sued petitioners and the Board of Education of the City of Chicago to have a three-year busing contract invalidated because the Board failed to notify Respondent of a critical amendment to the bid specifications. The Appellate Court of Illinois held that the Board of Education acted illegally and ordered the Circuit Court of Cook County to cancel the contract entered into pursuant to the illegal bidding procedures. At the time the Appellate Court ruled and the Illinois Supreme Court denied leave to appeal, one year still remained on the invalid contract. Petitioners, as parties to the illegal contracts, have filed this frivolous petition for a writ of certiorari in order to delay enforcement of the Appellate Court mandate. Even if unsuccessful, petitioners will have prevented justice from being done by delaying the Court's mandate until the point becomes moot.

Petitioners strain to contrive a federal question from the facts of the instant case but are unable to fabricate even a make-weight argument that the alleged federal question was raised in the state courts. The pleadings upon which this case was tried are reproduced in full in Willett Motor Coach Co.'s Appendices 1-5 (R. 245, 288, 306, 321, 342, 357). A review of the opinion, orders and pleadings clearly reflects that no federal question was litigated in the courts of the State of Illinois. Since no

federal question was raised by any party, at any stage of the litigation, the requirements of 28 U.S.C. § 1257(3) and U.S. Sup. Ct. Rule 21.1(h), 28 U.S.C. have not been met by petitioners.

This Court's pronouncements in *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981) are instructive if not dispositive of petitioners' petition. *Webb* involved a custody dispute between the mother and father of a minor child. The mother filed a petition for writ of certiorari in this Court and the father never disputed the mother's contention that a federal issue had been properly raised. Certiorari was granted. This Court ultimately dismissed the writ for want of jurisdiction and, in so doing, stated:

> Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. §1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner have "specially set up or claimed under the Constitution . . . of . . . the United States" that right which she now seeks to have this Court enforce. 28 U.S.C. §1257(3). Similarly our Rule 21.1(h) requires the petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." Our examination of the record convinces us that petitioner failed properly to raise or preserve a claim under the Full Faith and Credit Clause of the Federal Constitution in the Georgia courts.
>
> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when "the highest state court has failed to pass

> upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." [citations]

Webb v. Webb, 451 U.S. at 495-6, 101 S.Ct. at 1891, 68 L. Ed.2d at 396.

This analysis is applicable to the case at bar. Petitioners' petition does not and cannot specify how and when a federal question was raised. The pleadings frame no federal questions. Nowhere in the opinion of the Appellate Court of Illinois or in the orders of that court and the Illinois Supreme Court is any federal question mentioned. Here, as in *Webb*, this Court should assume that the omission of a reference to a federal question was due to want of proper presentation in the state courts.

The petition for a writ of certiorari was filed, therefore, only in an attempt to have this Court's judicial process consume the remainder of the third year of the contract held illegal by the Appellate Court of Illinois. Respondent prays for an expedited denial of this frivolous petition in order to minimize the effect of petitioners' tactics.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Date: September 22, 1982

APPENDIX 1

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

WILLETT MOTOR COACH CO., a foreign corporation, individually and on behalf of other taxpayers,

Plaintiff,

v.

No. 80 CH 4044

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate, ROBINSON BUS SERVICE, INC., an Illinois corporation, NORTHTOWN BUS SERVICE, LTD., an Illinois corporation, STEWART BUS COMPANY, INC., an Illinois corporation, STUDENT TRANSIT CORPORATION, BRADFORD SCHOOL BUS TRANSIT, INC., ELOYSE CARNEY SCHOOL BUS SERVICE, INC., RAPID BUS CO., J/B TRANSPORTATION, INC., ART'S TRANSPORTATION, INC., RANSOM TRANSPORTATION, BONAPARTE & JOHNSON, A & G CHARTER BUS SERVICE, SLEDGE TRANSPORTATION, J. L. HARRIS TRANSPORTATION, and A & D DAVENPORT TRANSPORTATION, an Illinois corporation,

Defendants.

FOR INJUNCTION AND DECLARATORY RELIEF

SECOND AMENDED COMPLAINT

Plaintiff, WILLETT MOTOR COACH CO., by its attorneys, TENNEY & BENTLEY, complains of defendants, BOARD OF EDUCATION OF THE CITY OF CHICAGO, ROBINSON BUS SERVICE, INC., NORTHTOWN BUS SERVICE, LTD., STEWART BUS COMPANY, INC., STUDENT TRANSIT CORPORATION, BRADFORD SCHOOL BUS TRANSIT, INC., ELOYSE CARNEY SCHOOL BUS SERVICE, INC., RAPID BUS CO., J/B TRANSPORTATION, INC., ART'S TRANSPORTATION, INC., RANSOM TRANSPORTATION, BONAPARTE & JOHNSON, A & G CHARTER BUS SERVICE, SLEDGE TRANSPORTATION, J.L. HARRIS TRANSPORTATION and A & D DAVENPORT TRANSPORTATION, INC., and states as follows:

1. Plaintiff, WILLETT MOTOR COACH CO., ("Willett") a foreign corporation licensed to do business in Illinois, is engaged in the business of providing busing services for the transportation of students attending Chicago Public Schools which are under the administration, auspices and control of defendant, BOARD OF EDUCATION OF THE CITY OF CHICAGO ("Board of Education"). Willett is a taxpayer of the State of Illinois, County of Cook and City of Chicago.

2. For the last 54 years Willett has provided busing services for the Board of Education, in connection with the transportation of handicapped pupils attending Chicago Public Schools.

3. On or about March 12, 1980, the Board of Education solicited bids for contracts to provide approximately 403 buses and other vehicles to be used for the transportation of handicapped children attending Chicago Public Schools for the period from September, 1980 through August, 1983. A copy of the Solicitation of Bids is attached hereto and made a part hereof as Exhibit A.

4. Willett received the Solicitation of Bids on or about March 13, 1980.

5. On or about March 21, 1980, the Board of Education amended the Solicitation of Bids. Said amendment was recited in a notice to bidders, a copy of which is attached hereto and made a part hereof as Exhibit B, and provides in relevant part:

Page 1, Section No. 3 titled Cancellation and Extension of Agreement—Delete the words "by the Board of Education of the City of Chicago" and replace with the words "by either party".

5 a. Pursuant to Chapter V, Section 5-4 of the Rules of the Board of Education, the Board of Education is required to advertise solicitations of formal bids in a newspaper of general circulation published in the City of Chicago. Chapter V, Section 5-4 of the Rules of the Board of Education reads in relevant part, as follows:

Sec. 5-4. Solicitation of Bids.

* * * *

Solicitation of formal bids shall be advertised in a newspaper of general circulation published in the City of Chicago at least 10 days before the bid date

. . . .

5 b. A copy of the publication that the Board of Education published to satisfy the advertisement requirements of Section 5-4 above is attached hereto and incorporated herein as Exhibit C.

5 c. Said publication was defective and inadequate to comply with the advertisement requirements of Section 5-4 above in that said publication failed to inform prospective bidders of the number of buses to be bid, the term of the contract, or any other provision contained in said Solicitation of Bids.

5 d. The Board of Education failed to publish the March 21, 1980 amendment to the Solicitation of Bids.

6. The effect of the amendment to the Solicitation of Bids alters the contract to permit a successful bidder to cancel its obligations to the Board of Education unilaterally on sixty-days notice. Without this amendment, a successful bidder would be obligated to perform its obligations for three years.

7. Said amendment caused a change in the Solicitation of Bids which is contrary to the interests of the Board of Education, in that, pursuant to said amendment, a successful bidder is authorized to cancel the con-

tract unilaterally if said bidder cannot fulfill its obligations pursuant to said contract.

8. The Board of Education mailed said notice to all prospective bidders listed on its List of Prospective Bidders, except that no notice was mailed to or otherwise communicated to Willett.

9. On April 15, 1980, Willett submitted its proposal to the Board of Education pursuant to the original Solicitation of Bids. On or prior to this date, no officer, director, agent or other representative of Willett had any knowledge that the Solicitation of Bids had been amended and had no knowledge of the March 21, 1980 notice.

10. On April 15, 1980, defendants, Robinson Bus Service, Inc., Northtown Bus Service. Ltd., Stewart Bus Company, Inc., Student Transit Corporation, Bradford School Bus Transit, Inc., Eloyse Carney School Bus Service, Inc., Rapid Bus Co., J/B Transportation, Inc., Art's Transportation, Inc., Ransom Transportation, Bonaparte & Johnson, A & G Charter Bus Service, Sledge Transportation, J. L. Harris Transportation, A & D Davenport, and former defendants Spears Transportation, Inc. Paige Transportation Co., and NHL Transportation, (hereinafter collectively referred to as "other bidders"), submitted their respective proposals pursuant to the Solicitation of Bids.

11. The changes contained in the amendment to the Solicitation of Bids were material factors to be considered in preparing bids and materially affected Willett's bid and other bidders' bids. Specifically, the information contained in the amendment substantially damaged Willett's labor negotiating stance; reduced the cost of the performance bond required by the Solicitation of Bids; and relieved bidders of the risk of labor increases beyond the wage escalation allowances contained in the Solicitation of Bids. Furthermore, Willett's lack of knowledge pertaining to said amendment, specifically described in paragraph 9 of this complaint, increased Willett's cost of performance bonding, placing Willett at a further economic disadvantage.

12. Had Willett received, or been aware of, the amendment, plaintiff would have submitted a proposal to defendant, Board of Education, in an amount less than the total amounts bid by the successful bidders.

13. Willett is informed and believes that other bidders received the notice of amendment prior to submitting their respective proposals to the Board of Education and thereby gained an unfair advantage with respect to the formulation and submission of their bids to the Board of Education.

14. Willett is informed and believes that the Board of Education awarded contracts pursuant to the Solicitation of Bids on June 11, 1980.

15. Willett and other taxpayers have been immediately and irreparably injured by the Board of Education awarding of contracts pursuant to the proposals received on April 15, 1980, in that:

(a) Willett has been denied an opportunity to submit a competitive proposal based upon the Solicitation of Bids as amended;

(b) Willett may be required to liquidate 486 buses valued at 2.8 million dollars (book value);

(c) Willett may be required to liquidate service equipment, parts, real estate and buildings which are maintained in connection with the business of busing school children;

(d) Willett may be forced out of business leaving the Board of Education with no responsible transportation company to fulfill its transportation requirements in the event one or more of the successful bidders elects to exercise its right to cancel its obligations on sixty-days notice.

(e) Willett has a labor agreement which still has two years to run under which it employs approximately 500 drivers, many of which it has employed for many years, which has been shaped to meet Board of Education requirements, requiring skills of a highly professional nature because of the special requirements for the transportation of physically and mentally handicapped

children and Willett will be forced to lay off and terminate the service of such skilled employees.

15 a. If the Board of Education rebids the Solicitation of Bids with proper publication and proper notice to prospective bidders, the bids will be less than the total amount bid and accepted by the Board of Education pursuant to the original Solicitation of Bids.

16. Willett and other taxpayers have no adequate remedy at law.

17. As a result of the Board of Education awarding bids to other bidders, the taxpayers have been irreparably damaged and will continue to be so damaged if this court does not enter the injunction relief requested below.

WHEREFORE, plaintiff WILLETT MOTOR COACH CO., prays for the entry of the following relief:

A. *Injunctive Relief*:

1. For a preliminary and permanent injunction requiring the Board of Education to revoke any and all contracts awarded pursuant to the Solicitation of Bids in connection with the transportation of handicapped children attending Chicago Public Schools for the period from September, 1980 through August, 1983 and further requiring the Board of Education to rebid this Solicitation of Bids attached hereto as Exhibit A.

B. Declaratory Relief:

For the entry of a declaratory judgment declaring that the bidding procedure followed by the Board of Education is illegal and improper and declaring all bids received pursuant to said bidding procedure to be null and void.

WILLETT MOTOR COACH CO.

By /s/ Richard J. Cochran

Tenney & Bentley
69 West Washington Street
Suite 2000
Chicago, Illinois 60602
236-4787

VERIFICATION

DAVID HOWELL, having been duly sworn on oath, deposes and states that he is the Chairman of WILLETT MOTOR COACH CO., that he has knowledge of the facts alleged in the foregoing second amended complaint and that the same are true in substance and in fact.

/s/ David W. Howell

Subscribed and sworn to before me
this 14th day of July, 1980.

/s/ Richard J. Cochran
Notary Public

APPENDIX 2

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — CHANCERY DIVISION

WILLETT MOTOR COACH CO., *Plaintiff,*	)	
v.	)	No. 80 CH 4044
BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al., *Defendants.*	)	

ANSWER TO SECOND AMENDED COMPLAINT

NOW COMES, STEWART BUS COMPANY, ROBINSON BUS SERVICE and RAPID TRANSPORTATION, INC., Intervenor-Defendants herein, by their Attorney, THOMAS N. TODD for their Answer to Second Amended Complaint herein, state:

1. Intervenors admit the allegations of Paragraph 1.

2. Intervenors are without sufficient knowledge or information to form a belief as to the truth or falsity of Paragraph 2.

3. Intervenors admit the allegations of Paragraph 3.

4. Intervenors are without sufficient knowledge or information to form a belief as to the truth or falsity of Paragraph 4.

5. Intervenors admit the allegations of Paragraph 5.

5a. Intervenors admit the allegations of Paragraph 5a.

5b. Intervenors admit the allegations of Paragraph 5b.

5c. Intervenors deny the allegations of Paragraph 5c.

5d. Intervenors are without sufficient knowledge or information to form a belief as to the truth or falsity of Paragraph 5d.

6. Intervenors deny the allegations of Paragraph 6.

7. Intervenors deny the allegations of Paragraph 7.

8. Intervenors are without sufficient knowledge or information to form a belief as to the truth or falsity of Paragraph 8.

9. Intervenors admit that the bid was submitted, but are without sufficient knowledge or information to form a belief about the remainder of the allegations of Paragraph 9.

10. Intervenors admit the allegations of Paragraph 10.

11. Intervenors are without sufficient information or knowledge to form a belief as to the truth or falsity of Paragraph 11.

12. Intervenors are without sufficient knowledge or information to form a belief as to the truth or falsity of Paragraph 12.

13. Intervenors are without sufficient knowledge or information to form a belief as to the truth or falsity of Paragraph 13.

14. Intervenors admit the allegations of Paragraph 14.

15. Intervenors deny the allegations of Paragraph 15.

15a. Intervenors deny the allegations of Paragraph 15a.

16. Intervenors deny the allegations of Paragraph 16.

17. Intervenors deny the allegations of Paragraph 17.

WHEREFORE, Intervenors-Defendants pray as follows:

1. That Plaintiff's request for Injunctive Relief be denied.

2. That Plaintiff's request for Declaratory Judgment be denied.

3. For Attorney Fees and any and all other relief that this Court deems appropriate.

ROBINSON BUS SERVICE
STEWART BUS COMPANY and
RAPID TRANSPORTATION
By /s/ Thomas N. Todd
Attorney for Intervenors-Defendants

Thomas N. Todd
One North LaSalle
Suite 1348
Chicago, IL 60602
(312) 236-9476

VERIFICATION

THOMAS N. TODD, having been duly sworn on oath, deposes and says that he is the Attorney for STEWART BUS COMPANY, ROBINSON BUS SERVICE and RAPID TRANSPORTATION, Intervenors-Defendants herein, that he has knowledge of the facts contained in the foregoing Answer to the Second Amended Complaint and that the same are true in substance and in fact.

/s/ Thomas N. Todd

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 16th day of October, 1980.
/s/ Betty C. Terry
Notary Public

APPENDIX 3

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — CHANCERY DIVISION

WILLETT MOTOR COACH CO., *Plaintiff,*	)	
v.	)	No. 80 CH 4044
BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al., *Defendants.*	)	

ANSWER OF INTERVENORS STUDENT TRANSIT CORPORATION AND NORTHTOWN BUS SERVICE, LTD. TO SECOND AMENDED COMPLAINT

Student Transit Corporation and Northtown Bus Service, Ltd., intervenor defendants herein, by their attorneys, Freeman, Atkins & Coleman, Ltd., for their answer to the Second Amended Complaint herein state:

1-2. They are without knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 1-2 of the Second Amended Complaint and, therefore, neither admit nor deny the same but demand strict proof thereof insofar as they may be relevant to these proceedings.

3. They admit the allegations of paragraph 3 of the Second Amended Complaint.

4. They are without knowledge or information to form a belief as to the truth or falsity of the allegations in paragraph 4 of the Second Amended Complaint and, therefore, neither admit nor deny the same but demand strict proof thereof insofar as they may be relevant to these proceedings.

5-5(b). They admit the allegations of paragraph 5-5(b) of the Second Amended Complaint.

5(c)-5(d). They are without knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 5(c)-5(d) of the Second Amended Complaint and, therefore, neither admit nor deny the same but demand strict proof thereof insofar as they may be relevant to these proceedings.

6. They admit the allegations of paragraph 6 of the Second Amended Complaint.

7-9. They are without knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 7-9 of the Second Amended Complaint and, therefore, neither admit nor deny the same but demand strict proof thereof insofar as they may be relevant to these proceedings.

10. They admit the allegations of paragraph 10 of the Second Amended Complaint insofar as said allegations relate to Student Transit Corporation and Northtown Bus Service, Ltd., and are without knowledge or information to form a belief as to the truth or falsity of the remainder of the allegations of paragraph 10.

11-13. They are without knowledge or information to form a belief as to the truth or falsity of the allegations in paragraphs 11-13 of the Second Amended Complaint and, therefore, neither admit nor deny the same but demand strict proof thereof insofar as they may be relevant to these proceedings.

14. They admit the allegations of paragraph 14 of the Second Amended Complaint.

15. They deny the allegations of paragraph 15 of the Second Amended Complaint.

16. Plaintiff does not state a claim upon which legal, equitable or declaratory relief can be granted; has not been injured by the actions of any defendant or intervenor-defendant; and has not suffered any wrong for which the law should provide a remedy.

17. They deny the allegations of paragraph 17 of the Second Amended Complaint.

AFFIRMATIVE DEFENSES:

A. The Second Amended Complaint filed herein fails to state a cause of action at law or in equity.

B. The plaintiffs lack standing to bring this action.

WHEREFORE, intervenor-defendants Student Transit Corporation and Northtown Bus Service, Ltd. pray that this action be dismissed without prejudice and that they may have judgment entered herein in their favor with prejudice and for costs.

Respectfully submitted,

FREEMAN, ATKINS & COLEMAN, LTD.

By: /s/ Kenneth P. Ross
One of the Attorneys
for Intervenors

Robert S. Atkins
Kenneth P. Ross
Freeman, Atkins & Coleman, Ltd.
100 West Monroe Street, 21st Fl.
Chicago, Illinois 60603
782-0337

STATE OF ILLINOIS
COUNTY OF COOK—ss

BERNARD COHEN, being first duly sworn on oath, deposes and says that he is an officer of and is the duly authorized agent in this behalf of the defendant-intervenor Student Transit Corporation; that he has read the above and foregoing Answer by him subscribed; that

he knows the contents thereof, and that the same are true to the best of his knowledge.

/s/ Bernard Cohen

SUBSCRIBED AND SWORN To before me
this 18th day of September, 1980.

/s/ Karen Boos
Notary Public

STATE OF ILLINOIS
COUNTY OF COOK—SS

JULIUS POLAN, being first duly sworn on oath, deposes and says that he is an officer of and is the duly authorized agent in this behalf of the defendant-intervenor Northtown Bus Service; that he has read the above and foregoing Answer by him subscribed; that he knows the contents thereof, and that the same are true to the best of his knowledge.

/s/ Julius Polan

SUBSCRIBED AND SWORN To before me
this 18th day of September, 1980.

/s/ Barbara J. Harris
Notary Public

STATE OF ILLINOIS
COUNTY OF COOK—SS

AFFIDAVIT OF FILING AND SERVICE

Ursula Anderson, a non-attorney on oath states that she caused the within Answer of Intervenors Student Transit Corporation and Northtown Bus Service, Ltd. to Second Amended Complaint to be filed with the Clerk of the Circuit Court of Cook County, Chancery Division, and served same by mailing copies thereof, with proper postage prepaid, to counsel of record per the attached service list, all this 22nd day of September, 1980.

/s/ Ursula Anderson

Subscribed and sworn to before me
this 22nd day of September, 1980

/s/ Karen Boos
Notary Public

SERVICE LIST

Marc D. Ginsberg
Tenney & Bentley
69 West Washington
Chicago, IL 60602

Thomas Todd
1 N. LaSalle
Chicago, IL 60602

Albert I. Zemel
134 N. LaSalle
Chicago, IL 60602

Michael J. Murray
Board of Education
228 N. LaSalle St.
Chicago, IL 60601

Edward C. Peterson
Board of Education
228 N. LaSalle St.
Chicago, IL 60601

APPENDIX 4

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — CHANCERY DIVISION

WILLETT MOTOR COACH CO., *Plaintiff,*	)	
v.	)	No. 80 CH 4044
BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al., *Defendants.*	)	

REPLY TO AFFIRMATIVE DEFENSES OF INTERVENOR-DEFENDANTS STUDENT TRANSIT CORPORATION AND NORTHTOWN BUS SERVICE, LTD.

Plaintiff, WILLETT MOTOR COACH CO., by its attorneys, TENNEY & BENTLEY, hereby replies to the affirmative defenses of intervenor-defendants Student Transit Corporation and Northtown Bus Service, Ltd. and states:

1. Plaintiff denies each and every allegation contained in paragraph A of intervenor-defendants' affirmative defenses.

2. Plaintiff denies each and every allegation contained in paragraph B of intervenor-defendants' affirmative defenses.

WHEREFORE, plaintiff, WILLETT MOTOR COACH CO., requests that the affirmative defenses of intervenor-

defendants Student Transit Corporation and Northtown Bus Service, Ltd., be stricken and dismissed with prejudice and that plaintiff be awarded its costs incurred herein.

TENNEY & BENTLEY

By /s/ Richard J. Cochran
Attorneys for Plaintiff

Tenney & Bentley
69 W. Washington Street
Suite 2000
Chicago, Illinois 60602
236-4787

VERIFICATION

RICHARD J. COCHRAN, being first duly sworn on oath, deposes and states that he is one of the attorneys for plaintiff, WILLETT MOTOR COACH CO.; that he has read the above reply to affirmative defenses of intervenor-defendants Student Transit Corporation and Northtown Bus Service, Ltd.; that he knows the contents thereof, and that the same are true to the best of his knowledge and belief.

/s/ Richard J. Cochran

Subscribed and sworn to before me
this 15th day of October, 1980.

/s/ Charmain J. Judge
Notary Public

APPENDIX 5

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

WILLETT MOTOR COACH CO., a foreign corporation, individually and on behalf of other taxpayers, *Plaintiff,*	)	
v.	)	No. 80 CH 4044
BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate, et al., *Defendants.*	)	

ANSWER TO SECOND AMENDED COMPLAINT

The BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate, defendant herein, by its Attorney, MICHAEL J. MURRAY, for its answer to the second amended complaint herein states:

1. It is without knowledge or information sufficient to form a belief as to whether plaintiff is a taxpayer of the State of Illinois, County of Cook and City of Chicago, and therefore neither admits nor denies the same but demands strict proof thereof insofar as they may be relevant to these proceedings. It admits the remaining allegations of Paragraph 1 of the second amended complaint.

2-3. It admits the allegations of Paragraphs 2 and 3 of the second amended complaint.

4. It is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 4 of the second amended complaint and, therefore, it neither admits nor denies the same but demands strict proof thereof insofar as they may be relevant to these proceedings.

5-5b. It admits the allegations of paragraphs 5 to 5b of the second amended complaint.

5c. The allegations of paragraph 5c of the second amended complaint are erroneous conclusions of the pleader which ought to be stricken and which conclusions are denied. Further answering, it alleges that said publication was in fact sufficient so that plaintiff and other bidders did in fact obtain adequate information for the submission of a bid.

5d. The allegations of paragraph 5d of the second amended complaint are irrelevant, incompetent and immaterial in that Board Rule 5-4 does not require the publication of amendments to Solicitation of Bids.

6. It admits the allegations of paragraph 6 of the second amended complaint.

7. The allegations of paragraph 7 of the second amended complaint are incompetent and erroneous conclusions of the pleader which ought to be stricken and which conclusions are denied.

8. It denies the allegations of paragraph 8 of the second amended complaint.

9. It admits that plaintiff submitted its proposal on April 15, 1980. It is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 9 of the second amended complaint and therefore it neither admits nor denies the same but demands strict proof thereof insofar as they may be relevant to these proceedings.

10. It admits the allegations of paragraph 10 of the second amended complaint.

11. It denies the allegations of paragraph 11 of the second amended complaint.

12. It denies the allegations of paragraph 12 of the second amended complaint.

13. It denies the allegations of paragraph 13 of the second amended complaint.

14. It admits the allegation of paragraph 14 of the second amended complaint.

15. It denies the allegations of paragraph 15 of the second amended complaint.

15a. It denies the allegations of paragraph 15a of the second amended complaint.

16. Plaintiff has not been injured by the actions of this defendant and therefore plaintiff has not suffered any wrong for which the law should provide a remedy.

17. It denies the allegations of paragraph 17 of the second amended complaint.

WHEREFORE, the BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate, defendant herein, by its Attorney, MICHAEL J. MURRAY, prays that this action be dismissed as to it and that it may have judgment entered herein in its favor with prejudice and for costs.

BOARD OF EDUCATION OF
THE CITY OF CHICAGO,
a body politic and corporate,

By /s/ WILLIAM J. MERGES,
Assistant Director of Purchases

MICHAEL J. MURRAY,
Attorney,
EDWARD C. PETERSON,
Assistant Attorney,
228 North LaSalle Street
Chicago, Illinois 60601
641-3900

STATE OF ILLINOIS
COUNTY OF COOK—SS

WILLIAM J. MERGES, being first duly sworn on oath, deposes and says that he is Assistant Director of Purchases and is the duly authorized agent in this behalf of the defendant Board of Education of the City of Chicago; that he has read the above and foregoing Answer by him subscribed; that he knows the contents thereof, and that the same are true to the best of his knowledge.

/s/ WILLIAM J. MERGES

SUBSCRIBED AND SWORN To before me
this ..... day of July, 1980.

/s/ _____
Notary Public

CERTIFICATE OF MAILING

EDWARD C. PETERSON, one of the attorneys for defendant, Board of Education of the City of Chicago, certifies that a copy of the foregoing Answer was served by mail this ..... day of July, 1980, on all parties not yet held in default.

/s/ EDWARD C. PETERSON

APPENDIX 6

STATEMENT PURSUANT TO U.S. SUP. CT. RULE 28.1

Respondent, WILLETT MOTOR COACH CO., has the following parent company: WILLETT, INC.

Respondent, WILLETT MOTOR COACH CO. has the following affiliates: THE WILLETT COMPANY (ILL.), WILLETT NATIONALEASE CO., WILLETT EQUIPMENT COMPANY, WILLETT TRANSPORTS, INC., WILLETT INTERSTATE SYSTEM, INC., WILLETT OF TEXAS, INC., TRANSPORT DRIVERS, INC., CROSSTOWN SERVICES, INC., SKYLINE INTERMODAL SERVICES, INC., AMI EQUIPMENT CO., SPEARS TRANSPORTATION, INC., and MIDWEST BUS SALES, INC.

Respondent, WILLETT MOTOR COACH CO., has no subsidiaries.

APPENDIX 7

STATUTES

28 U.S.C. §1257(3)

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

U.S. Sup. Ct. Rule 21.1(h), 28 U.S.C.

Rule 21. The petition for certiorari

1. The petition for writ of certiorari shall contain, in the order here indicated:

* * *

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record,

or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule.

Office - Supreme Court, U.S.
FILED
OCT 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-343

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROBINSON BUS SERVICE, INC., STEWART BUS COMPANY, INC., RAPID TRANSPORTATION, INC., STUDENT TRANSIT CORPORATION and NORTHTOWN BUS SERVICE, LTD.,

Petitioners,

v.

WILLETT MOTOR COACH CO.,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

REPLY BRIEF FOR PETITIONERS

ROBERT S. ATKINS*
KENNETH P. ROSS
SUSAN DAUMER PADOVE
FREEMAN, ATKINS & COLEMAN, LTD.
2300 Three First National Plaza
Chicago, Illinois 60602
(312) 444-1000
Attorneys for Petitioners

* Counsel of Record

Date: September 30, 1982

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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In The

Supreme Court of the United States

October Term 1982

ROBINSON BUS SERVICE, INC., STEWART BUS COMPANY, INC., RAPID TRANSPORTATION, INC., STUDENT TRANSIT CORPORATION and NORTHTOWN BUS SERVICE, LTD.,

Petitioners,

v.

WILLETT MOTOR COACH CO.,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

REPLY BRIEF FOR PETITIONERS

Petitioners Robinson Bus Service, Inc., Stewart Bus Company, Inc., Rapid Transportation, Inc., Student Transit Corporation and Northtown Bus Service, Ltd.* reply to Respondent's Brief in Opposition ("Resp. Brf.") as follows:

Respondent is incorrect in arguing that the pleadings of this case "frame no federal questions." (Resp. Brf. at 4). Respondent's initial Complaint in this action was dis-

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* Petitioners' statement pursuant to Supreme Court Rule 28.1 is set forth at page A17 of the Petition filed August 26, 1982.

missed by the trial court on the ground that respondent lacked standing as a losing bidder to vitiate the award of a public contract. Shortly after its action was dismissed, respondent filed a Second Amended Complaint, virtually identical to its original pleading, but alleging, *inter alia*, that: "Willett is a taxpayer of the State of Illinois . . ." (Resp. Brf. at A2); "Willett and other taxpayers have been immediately and irreparably injured . . ." (*Id.* at A5); and "Willett and other taxpayers have no adequate remedy at law." (*Id.* at A6). In their Answer to Willett's rather convoluted invocation of taxpayer standing for the sole purpose of pursuing its own interests to the detriment of the taxpayers' interests, petitioners Student Transit Corporation and Northtown Bus Service, Ltd. raised as an affirmative defense that Willett again lacked standing to bring its action. (Resp. Brf. at A13). Thus, respondent's inadequacy as the representative of the interests of the taxpayers it purports to represent—the very issue that is presented by this Petition—was asserted by petitioners at the earliest possible stage of these proceedings.

Petitioners' challenge to the adequacy of Willett's representative status was further pressed at each subsequent stage of the proceedings. Petitioners argued that Willett's interests in the litigation were antagonistic to the taxpayers at large before the Appellate Court of Illinois (*Willett Motor Coach Co. v. Board of Education, Etc., et al.*, No. 81-1134, Brief and Argument of Intervenor-Appellees at 9-12), before that court on Petition for Rehearing* (*Id.*, Petition for Rehearing at 10-15 and

* In response to the Appellate Court's superficial treatment of petitioners' challenge to respondent's taxpayer standing, petitioners wrote in their Petition for Rehearing: "Finally, intervenors submit that this Court has lost sight of the ultimate concern for protecting the taxpayers' interest." (Petition for Rehearing to the Appellate Court of Illinois at 14).

Reply Brief Petition for Rehearing at 6-8); and before the Supreme Court of Illinois (*Willett Motor Coach Co. v. Board of Education, Etc., et al.*, No. 56435, Petition for Leave to Appeal at 32-36). The Attorney General of the State of Illinois also filed a brief in the Supreme Court of Illinois in support of petitioners' Petition for Leave to Appeal to that court that also raised the issue of respondent's taxpayer standing. The Attorney General concluded: "[T]he plaintiff should not have had standing as a taxpayer to enforce his right as a bidder on a government contract where the result would be injurious to taxpayers." (Brief of Attorney General Tyrone C. Fahner at 3).

Therefore, it is disingenuous to imply that petitioners have waived the question presented to this Court in the proceedings below. The conflict between respondent's own interests and the interests of the taxpayers it purports to represent was asserted at each stage of the state court proceedings. Respondent cannot be heard to complain of any lack of notice that the issue would again be asserted here. *Cf. Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981).

Respectfully submitted,

ROBERT S. ATKINS*
KENNETH P. ROSS
SUSAN DAUMER PADOVE
FREEMAN, ATKINS & COLEMAN, LTD.
2300 Three First National Plaza
Chicago, Illinois 60602
(312) 444-1000
Attorneys for Petitioners

* Counsel of Record

Date: September 30, 1982